(24)

No. 97-1337

Supreme Court, U.S.
FILED
OCT 28 1998
CLERK

In The

Supreme Court of the United States

October Term, 1998

STATE OF MINNESOTA; Minnesota Department of Natural Resources; RODNEY SANDO, Commissioner of Natural Resources; ARNE CARLSON, Governor of Minnesota; RAYMOND B. HITCHCOCK, Assistant Commissioner of Operations, Minnesota Department of Natural Resources,

Petitioners,

v.

MILLE LACS BAND OF CHIPPEWA INDIANS, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF FOR THE PETITIONERS

HUBERT H. HUMPHREY III
Attorney General
State of Minnesota

JOHN L. KIRWIN
Assistant Attorney General
Counsel of Record

PETER L. TESTER
MICHELLE E. BEEMAN
Assistant Attorneys General
445 Minnesota Street, Suite 900
St. Paul, Minnesota 55101-2127
(651) 296-3044

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

25 pgs

TABLE OF CONTENTS

Page

ARGUMENT 1

I. THE BANDS' TEMPORARY HUNTING, FISHING AND GATHERING PRIVILEGE WAS EXTINGUISHED UPON MINNESOTA'S STATEHOOD 1

A. The Bands' 1837 Treaty Privilege Was Temporary And Precarious 1

B. The Principle Recognized in *Ward* Has Not Been Overruled 3

C. Regulation Of Hunting and Fishing Is An Essential State Sovereign Function 5

D. Continuation Of The 1837 Treaty Privilege Substantially Encroaches On Minnesota's Sovereignty 7

II. THE 1850 PRESIDENTIAL ORDER TERMINATED THE BANDS' PRIVILEGE 10

A. The Plain Language Of The Treaty Gave The President Sole Discretion To Terminate The Privilege 10

B. The Courts May Not Review President Taylor's Decision To Terminate The Bands' Privilege 13

C. The Revocation Order Was Never Withdrawn, Nor Could The Executive Branch Unilaterally Create A Special Privilege To Hunt, Fish and Gather After The Treaty Privilege Had Been Extinguished 15

D. The Revocation Provision Of The 1850 Order Was Severable 17

TABLE OF CONTENTS – Continued

Page

III. THE 1855 TREATY EXTINGUISHED THE MILLE LACS BAND'S 1837 TREATY PRIVILEGE 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Alaska Airlines, Inc. v. Brock, 480 U.S. 678 (1987) 17

Arizona v. California, 373 U.S. 546 (1963) 4

Baldwin v. Fish & Game Comm'n, 436 U.S. 371 (1978) 7

Coyle v. Smith, 221 U.S. 559 (1911) 1, 2, 4, 5, 6

Crow Tribe v. Repsis, 73 F.3d 982 (10th Cir. 1995) 3

Dalton v. Specter, 511 U.S. 462 (1994) 14

Dick v. United States, 208 U.S. 340 (1908) 4

Johnson v. Gearlds, 234 U.S. 422 (1914) 4

Kleppe v. New Mexico, 426 U.S. 529 (1976) 6

Lac Courte Oreilles Band v. Voigt, 700 F.2d 341 (7th Cir. 1983) 11

Minnesota v. Hitchcock, 185 U.S. 373 (1902) 5

Missouri v. Holland, 252 U.S. 416 (1920) 6

Montana v. United States, 450 U.S. 544 (1981) 3

Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753 (1985) 18, 19

Perrin v. United States, 232 U.S. 478 (1914) 4

Spalding v. Chandler, 160 U.S. 394 (1896) 18

United States v. 43 Gallons of Whisky, 93 U.S. 188 (1876) 4

United States v. Thomas, 151 U.S. 577 (1894) 4, 5

United States v. Winans, 198 U.S. 371 (1905) 3, 4, 7

TABLE OF AUTHORITIES – Continued

Page

Ward v. Race Horse, 163 U.S. 504 (1896) ..... *passim*

Winters v. United States, 207 U.S. 564 (1908) 3

Wisconsin v. Hitchcock, 201 U.S. 202 (1906) 4, 5

ARGUMENT

I. THE BANDS' TEMPORARY HUNTING, FISHING AND GATHERING PRIVILEGE WAS EXTINGUISHED UPON MINNESOTA'S STATEHOOD.

The State's opening brief explained that the Bands' temporary hunting, fishing and gathering privilege was extinguished when Minnesota was admitted to the Union in 1858. This Court held in *Ward v. Race Horse*, 163 U.S. 504 (1896) that, when a treaty grants Indians a right that is temporary and precarious and would encroach on a traditional area of state sovereignty, and the admission act does not specifically preserve the treaty right, then that right ends when a new State that includes the affected area is admitted to the Union. The policy underlying *Ward* is that Congress intends to vest in the new State the full range of sovereignty traditionally held by States. Indeed, this Court has held that the Constitution requires Congress to convey the full available sovereignty to the new State, rather than withholding it. *See Coyle v. Smith*, 221 U.S. 559 (1911).

A. The Bands' 1837 Treaty Privilege Was Temporary And Precarious.

The United States correctly recognizes that the temporary-versus-permanent nature of the treaty right is the "touchstone of the Court's analysis" in *Ward*. (U.S. Br. at 42.) As the Court explained in *Ward*, if the right was intended to be permanent, then the government should not go back on the bargain it made. If, on the other hand, the treaty itself contemplated that the right would end or that the federal government might end it, then the federal government would be presumed to convey that area of sovereignty to the new State, rather than withholding it.

The policy and holding of *Ward* are directly applicable here. The 1837 Treaty reserved the Indians' privilege only during the pleasure of the President. After the adoption of the Treaty, the federal government *had at its disposal* the ability

to fully regulate hunting, fishing and gathering in the ceded territory, since the President could terminate the privilege at his pleasure. Under *Ward*, when Minnesota was admitted to the Union in 1858, the federal government conveyed this traditional area of state sovereignty – the ability to regulate hunting, fishing and gathering – to the State rather than retaining it. Under *Coyle*, Congress was *required* to convey the available sovereignty to the State.

The federal government contends that Congress did not intend that the Treaty privilege be temporary, and that the context of the treaty in *Ward* was different from that of the Treaty here. The government asserts that, at the time the *Ward* treaty was negotiated, it was understood that the ceded land "was destined to be occupied and settled by the white man." (U.S. Br. at 44, *quoting from Ward*, 163 U.S. at 509.) But the context of the 1837 Treaty here made it equally clear that the ceded land would eventually be needed for settlement by non-Indians. Indeed, Territorial Governor Dodge told the Indians during the negotiations that "[i]t will probably be many years before your Great Father will want all these lands for the use of his white Children." JA 78. And the annual reports of the Commissioner of Indian Affairs between 1837 and 1850 described the privilege as temporary. *See, e.g.*, JA 138-39, 145, 147.

The 1837 Treaty privilege was both temporary and precarious – temporary because it was specifically contemplated that it would end and precarious because it existed only at the pleasure of the president. Moreover, as explained in the State's opening brief, it was also precarious for essentially the same reason that the right in *Ward* was precarious – because sale of the land to private parties could defeat the exercise of the right.

Respondents argue that Congress's act in granting statehood to Minnesota was insufficient to terminate the temporary treaty privilege because, they assert, Congress's intention to abrogate Indian treaty rights must be clear and plain. But the Court's equal footing decisions are obviously an exception

to the general principle, creating a contrary presumption in certain matters relating to the powers of newly created States. Thus, the Court has repeatedly recognized a presumption that submerged lands were not reserved for Indian tribes, but rather that the federal government reserved title to such lands for the benefit of future States. *See, e.g., Montana v. United States*, 450 U.S. 544, 552-54 (1981); *id.* at 567-69 (Stevens, J., concurring) (stating presumption prevails over normal treaty construction principles). Express indication that such lands were conveyed or reserved to the tribes is required to overcome the presumption that the lands were held in trust for the future States. *Id.* at 554. Likewise, under *Ward*, where the Indians' treaty rights are temporary and precarious at their inception, it is presumed that Congress intended not to continue those rights after statehood, but to instead vest that area of sovereignty in the new State.

B. The Principle Recognized in *Ward* Has Not Been Overruled.

Respondents contend that *Ward* has been or should be overruled. As the Tenth Circuit recognized in *Crow Tribe v. Repsis*, 73 F.3d 982 (10th Cir. 1995), however, *Ward*'s holding has not been rejected, and the principles on which it is based remain sound.

Respondents assert that this Court rejected *Ward's* holding nine years later in *United States v. Winans*, 198 U.S. 371 (1905). But *Winans* was fully consistent with *Ward*, and in fact was based on the temporary/permanent distinction made in *Ward*. This Court in *Winans* held that, based on the particular treaty language, the right "was intended to be continuing against the United States and its grantees as well as against the state and its grantees." 198 U.S. at 381-82.[1] In another

---

[1] Similarly, in *Winters v. United States*, 207 U.S. 564, 577 (1908), the Court rejected the appellants' equal footing argument, apparently because the treaty contemplated that the retained water rights would be permanent.

equal footing decision just six years after *Winans*, *Coyle v. Smith*, 221 U.S. at 576, the Court cited *Ward's* equal footing holding (including its factual context) with approval.

Respondents' other arguments that *Ward* has been rejected are likewise erroneous. In four cases cited by Respondents, treaties provided that federal laws prohibiting liquor sales in Indian Country would apply to ceded, non-reservation lands adjoining the lands where the Indians would continue to reside. *See United States v. 43 Gallons of Whisky*, 93 U.S. 188 (1876); *Dick v. United States*, 208 U.S. 340 (1908); *Perrin v. United States*, 232 U.S. 478 (1914); *Johnson v. Gearlds*, 234 U.S. 422 (1914). Each of these decisions relies on the enumerated constitutional power of the federal government to regulate commerce with Indians. *See, e.g., 43 Gallons*, 93 U.S. at 197; *Perrin*, 232 U.S. at 482-85; *Johnson*, 234 U.S. at 438-40. The decisions do not undercut *Ward*. They merely recognize that, regardless of treaty provisions or a State's admission to the Union, and notwithstanding the general authority of the State to regulate the sale of liquor, the federal government is authorized under the Indian Commerce Clause to regulate sales of liquor on or near Indian Country.

Respondents also assert that two decisions concerning the federal grant of "school lands" to the State of Wisconsin demonstrate that temporary treaty rights are not extinguished by statehood. *See United States v. Thomas*, 151 U.S. 577 (1894); *Wisconsin v. Hitchcock*, 201 U.S. 202 (1906). These are not equal footing cases, i.e., the Court did not determine what rights were implicitly bestowed upon the State upon admission to the Union. Instead they involved a conflict between Wisconsin's 1846 enabling act that *specifically* granted the State section 16 of every township for the use of

---

Arizona v. California, 373 U.S. 546, 597-98 (1963), cited by the amicus Indian groups, did not involve an equal footing argument. In that case the federal government reserved water rights *after* Arizona's statehood, and the Court held that the government had the authority to do so under the Commerce and Property Clauses of the Constitution. *Id.*

schools, and an 1854 Treaty that granted certain Indian bands reservations in Wisconsin consisting of three entire townships. The Court rejected the State's claim that it had gained title to the sixteenth sections, even within the Indian reservations. The ultimate basis for these decisions was best articulated in *Minnesota v. Hitchcock*, 185 U.S. 373 (1902), where the Court noted that the enabling act was worded in future, rather than present, terms – that the school sections "*shall* be granted." *Id.* at 392. The Court then said:

> [T]he act of admission, with its clause in respect to school lands, was not a promise by Congress that under all circumstances, either then or in the future, these specific school sections were or should become the property of the state. The possibility of other disposition was contemplated, the right of Congress to make it was recognized, and provision made for a selection of other lands in lieu thereof.

Id. at 400-01. *Minnesota v. Hitchcock* was cited as authority for the decision in *Wisconsin v. Hitchcock*. *See* 201 U.S. at 215. Neither the latter decision nor *Thomas* in any way undercuts the equal footing holdings of *Ward* and *Coyle*.[2]

C. Regulation Of Hunting and Fishing Is An Essential State Sovereign Function.

The amici Indian groups argue that the equal footing doctrine has only two aspects, which do not include the situation at issue here. They argue that the doctrine provides that (1) Congress may not impair the new State's "core

---

[2] While *Thomas* and *Wisconsin* discuss continuing rights of occupancy under an 1842 treaty, that was not the ultimate basis for the decisions. If it were, Wisconsin would not have gained title to any of the sixteenth sections throughout *any* of the 1842 ceded territory, rather than just the reservations. And if the Indian right of occupancy under the 1842 Treaty had prevented specific federal disposition of land in the ceded area, the government would have been precluded from patenting any of the land throughout the entire ceded territory (not just the reservations) to private parties. But this was clearly not the case.

sovereign authority" and (2) there is a presumption that the new State gains ownership of submerged lands.

To illustrate the first aspect, core sovereign authority, Amici point to *Coyle v. Smith*, 221 U.S. 559 (1911), where this Court held that the equal footing doctrine invalidated a provision of Oklahoma's enabling act prohibiting the State from moving the site of its capital for seven years. However, Amici's claim that the right to regulate hunting and fishing is less important and less central to a State's sovereignty than the right to choose the site of the state capital has no basis. In *Coyle*, this Court said that Congress could not impose a limitation on state power as a condition of statehood, if Congress could not directly impose the same condition after statehood based on one of the federal government's enumerated powers. Since nothing in the Constitution allowed Congress to dictate the location of the capital of an existing State, Congress could not accomplish the same thing by attaching a condition to Oklahoma's enabling act. *See* 221 U.S. at 573-74.

But the federal government likewise has no general authority to regulate hunting and fishing.[3] If a State's enabling act provided that the State would have no authority to regulate the taking of game and fish, and that this authority would instead remain with the federal government, that condition would undoubtedly be invalid for exactly the reason identified in *Coyle*: the federal government may not choose to retain to itself a traditional area of state sovereignty, rather than vesting it in a newly created State. Indeed, the Court cited and relied upon *Ward* in reaching its holding in *Coyle*. *See* 221 U.S. at 576. Amici cannot explain their contention that location of the state capital is more important to state

[3] There is no wildlife clause in the federal Constitution. Instead, the federal government may make limited laws relating to hunting and fishing only pursuant to a specifically enumerated power. *See, e.g., Kleppe v. New Mexico*, 426 U.S. 529, 540 (1976) (Property Clause); *Missouri v. Holland*, 252 U.S. 416, 435 (1920) (federal government could enact Migratory Bird Treaty Act under Treaty Clause, where important national interest could be protected only in concert with a foreign power).

sovereignty than regulation of the State's natural resources, nor do they explain their assertion that ownership of submerged lands "go[es] to the heart of representative government" (Br. of Amici National Congress at 15 n.9), while regulation of natural resources does not. This Court has recognized, more recently than *Ward*, "the importance to its people that a State have the power to preserve and regulate the exploitation of" wildlife. *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 386 (1978).

In any event, Amici's argument is beside the point. *Ward* and *Winans* recognize that under some circumstances the federal government may, before the creation of a State, make a binding treaty with the Indians that will limit an area of the State's traditional sovereignty for the benefit of Indian tribes. These cases also make clear, however, that this will occur only where the treaty right is permanent from its inception – where the federal government has *bound* itself to continue such right.[4]

D. Continuation Of The 1837 Treaty Privilege Substantially Encroaches On Minnesota's Sovereignty.

Respondents contend that this Court's "conservation necessity" standard reconciles state authority and Indian rights, so that there is no encroachment on state sovereignty. Contrary to Respondents' arguments, the impairment of Minnesota's sovereign interests is real and substantial, and the conservation-necessity standard does not avoid this encroachment. Instead, it only defines the manner in which the court and the bands will limit state decisionmaking authority. The conservation-necessity standard infringes state sovereignty in two ways – by dictating *who* makes the decisions and *what* decisions may be made.

[4] The State recognizes, of course, that Congress may also create a binding treaty right that would limit state sovereignty when it approves a cession of Indian land *after* statehood.

It is the court, not the State, which has the ultimate authority to determine where the conservation-necessity line is. The district court ruled, over the State's objection, that the "State and the Bands shall attempt to reach consensus on harvestable surplus determinations . . . but may seek resolution of disputes regarding such determinations from the Court." PA 161; *see also* PA 100-01. Thus the State must share sovereign decisionmaking with the Bands, subject to the court's oversight.

Equally important, the court has limited the range of the decisions the State may make over fundamental natural resource and land use decisions. Most fundamentally, the court's decision overrides the State's decision to provide broadest access to available resources by providing equal opportunity to interested persons to hunt and fish. And the court's decision limits the State's ability to establish the hunting and fishing methods and game population levels it believes most appropriate, or to withdraw game in certain areas from harvest altogether (e.g., by establishing parks and refuges) to accommodate other interests, such as the public's desire to see wildlife in its natural habitat. There can be no serious dispute that the State's normal range of decisionmaking about natural resource and land use management is changed substantially by the imposition of these rights, and federal court authority to enforce them. If this were not true, then this whole litigation has been about nothing.

Respondents assert that the State *stipulated* to most of the provisions of the district court's final natural resources management order, so that the State's sovereignty has not been impaired. But the State entered the stipulation process and made the various agreements as a result of the lower court's determinations that the State must share decisionmaking with the Bands, that certain types of state laws enacted through the State's normal political processes may not be enforced against Band members and that "the State's power to regulate Indian treaty rights is very narrow." PA 119; *see also* PA 344-46. And the State made such agreements subject to

appeal of the court's order that the privilege still exists. JA 1735. To suggest that the State made such agreements "voluntarily" wholly ignores the reality of the situation.

Under these ground rules, the State and the Bands stipulated that a number of state laws and rules, previously applicable to all who hunted and fished in Minnesota, could not be enforced against Band members. PA 80. Even so, the trial court determined that the State had not gone far enough in relinquishing its authority to regulate the taking of fish and game. The Bands applied to the district court, which ruled that several additional state laws and rules could not be applied to Band members, even though, the court observed, "the State may have commendable and sound reasons for its proposed regulations." PA 119; *see generally* PA 112-27.

The State has not sought this Court's review of these subsidiary rulings. The State's point here is different – that the imposition on the State of continued rights under the 1837 Treaty significantly encroaches on Minnesota's core sovereign function of regulating the taking of wildlife and administering its lands in an evenhanded manner for the benefit of all its citizens. The Bands assert that the implementation of the federal court's orders has gone relatively smoothly in Minnesota and, in recent years, in Wisconsin.[5] It is to the credit of these States and their citizens that the rule of law has prevailed without major incident. But this should not obscure the fact that the federal court's orders have overruled the policy judgments of state lawmakers in both States as to how to best regulate their natural resources, and that these officials comply under compulsion.

---

[5] The Bands have lodged with the Court certain documents, not part of the record in this case, attempting to demonstrate that the implementation of Indian treaty rights in the two States has been trouble free. The State objects to the lodging of these documents. Given the opportunity, Minnesota and Wisconsin would present a somewhat different picture of their attempts to regulate natural resource and land use, subject to the Bands' court-ordered rights. But this is not the time or the place to make a factual record on such issues.

II. THE 1850 PRESIDENTIAL ORDER TERMINATED THE BANDS' PRIVILEGE.

The Bands' 1837 Treaty privilege was also permanently terminated by President Taylor's 1850 Order that, no one disputes, expressly provided for the revocation of the privilege. The Respondents offer a number of arguments that the President's order was not effective to extinguish the privilege. None of these arguments has merit.

A. The Plain Language Of The Treaty Gave The President Sole Discretion To Terminate The Privilege.

Under the 1837 Treaty, the Bands were guaranteed the right to hunt, fish and gather in the ceded territory only "during the pleasure of the President." The ordinary meaning of such language is evident – that the President was given the sole authority to decide when the privilege would end. Respondents St. Croix Chippewa, et al., however, now argue for the first time that the language "during" the pleasure of the President did not authorize the President to *terminate* the privilege, but only to suspend it. They argue that the Treaty language provides that the privilege may come and go, according to the changing pleasure of whatever president is currently in office.

Though they now assert that the "off again, on again" interpretation is the Treaty's "plain meaning" (*see* St. Croix Br. at 25-27, 32), neither these Bands nor any other have previously proposed this interpretation in this case or any earlier litigation. To the contrary, at the urging of the Bands, the district court here determined that "the 1837 treaty *authorized termination* of the usufructuary privilege only if the Indians were to 'misbehave.' " PA 303-04 (emphasis added); *see also* PA 314. The Bands did not appeal this determination but rather, in their circuit court brief, acknowledged the President's ability to "terminate," "revoke" and "*cancel*" the privilege under the Treaty, albeit only for misbehavior. (*See* Wisc. Bands 8th Cir. Br. at 36, 45-49.) In the *Lac Courte*

Oreilles litigation concerning the Wisconsin portion of the 1837 Treaty area, none of the Bands suggested that the President's authority was only to suspend the privilege, rather than terminate it. *See Lac Courte Oreilles Band v. Voigt*, 700 F.2d 341, 361 (7th Cir. 1983) (court agrees with Bands' argument that 1837 Treaty "authorized termination of the [privilege] *only* if the Indians misbehaved"). As long ago as 1954, the same Bands asserted in litigation against the federal government: "This privilege of hunting, fishing and remaining in the ceded area (granted to these Indians temporarily) was *terminated* by Executive Order of February 2, 1850." JA 570 (emphasis added). After more than 50 years of litigation, *see* JA 555, during which scores of attorneys have represented the Bands and not discovered the "off again, on again" meaning, the Bands now claim this meaning is "plain."

The United States' brief does not concur in this novel interpretation. Instead, the government states that the Treaty "identified the circumstances in which the privilege *would terminate*," and the President "alone was vested with the power and discretion to determine whether the privilege *should end*." (U.S. Br. at 42 (emphasis added).) The context of the reserved privilege here, confirmed by Governor Dodge's statement to the Indians that, in probably many years, the President "will want all these lands for the use of his white Children," shows that it was contemplated that the privilege would terminate.[6]

The Bands also argue that the Indians did not understand at the time they entered the 1837 Treaty that it gave the President sole discretion to terminate the privilege, but rather that they understood that the President would not revoke it without good cause, or unless they misbehaved. They assert

---

[6] And the Bands' off again, on again interpretation could not sensibly work with their interpretation that the hunting, fishing and gathering privilege could only be terminated for Indian misbehavior. *See* St. Croix Br. at 46-47. Do they suggest that the President would suspend it while they were misbehaving, and then reinstate it when their behavior improved?

that there were problems interpreting the Treaty provisions for the Indians. Aside from current speculation by the Bands' witnesses, however, there was absolutely no evidence that the Indians who negotiated the Treaty did not understand that the President had sole discretion to revoke the privilege, or that they understood he could do so only for Indian misbehavior or other good cause.

Governor Dodge told the Bands during the negotiations that the government "will read it by articles, so that every word may be clearly conveyed and understood by you." JA 88. The Bands' expert linguist stated that some of the interpreters at the negotiations were likely fluently bilingual in the Chippewa language and English. JA 849. He agreed that interpreters could have explained to the Indians that they would be allowed to hunt, fish and gather in the ceded area as long as the President allowed. JA 1184-86, 1192-93. There was not a single bit of evidence that this was not explained to the Indians.

Likewise, there was not even a sliver of evidence that the Indians understood during the Treaty negotiations that the President would revoke the Treaty privilege only for Indian misbehavior, or that he needed any reason to terminate it. Respondents cite evidence related to a different treaty (the 1842 treaty) concerning a different area, negotiated five years later.

The one piece of evidence the Bands cite describing Indian understanding at the time of the Treaty is a letter from Missionary William Boutwell who attended the Treaty negotiations at the Indians' request. *See* JA 98. But Boutwell's letter indicates a full understanding that the President could terminate the Indians' privilege at his discretion. He said, "They are to receive their annuities for 20 years, but can remain on the lands only during the pleasure of the Pres." JA 99. He stated that the Indians "know nothing of the *duration* of a man's pleasure," and suggested that the Indians would be upset if required to remove in less than five years. *Id.*

(emphasis added). Thus, Boutwell suggested no misunderstanding about whether the President could end the privilege at his discretion, but only that the Indians would be upset if it were ended too soon.

Other correspondence in the 1837-40 period shows that the Indians and the missionaries who attended the negotiations on their behalf understood immediately after the Treaty that the Indians' privilege, and perhaps their occupancy of the land, could soon be terminated by the President. *See, e.g.*, JA 959-62, 1502-03.

Where the language of the Treaty is plain, and would have had an obvious meaning to the Senate which approved it, that plain meaning should be overcome only by compelling evidence that the Indians understood something different. There is no such evidence here. The *only* contemporaneous evidence showed that the Indians knew that the privilege was temporary, and existed at the will of the President. There is *no* non-speculative evidence to contradict the Treaty's plain meaning.

B. The Courts May Not Review President Taylor's Decision To Terminate The Bands' Privilege.

The Bands argue that the President's Order revoking the Treaty privilege was unlawful, because the federal government had a duty of good faith to the Indians. They assert that the land was not needed for settlement, and that some who urged the revocation of the privilege and the removal of the Indians were motivated by personal financial or political interests.

Indeed, the record does show that some of those behind the removal/revocation effort sought personal monetary or political advantage. But the record also shows that the Indians were creating problems with respect to non-Indian settlers and that many persons advocated revocation and/or removal for these and other reasons. An 1843 report of the Commissioner of Indian Affairs recommended removal of the Indians for their own good, because of the effects of liquor. JA 652.

The same year, Indians destroyed lumbermen's dams in the ceded area. JA 707. (Recall that the initial purpose of the Treaty had been to obtain access to the lumber on the lands.) The first calls from Wisconsin for removal of the Indians from ceded lands arose because the Indians sometimes took food from farmers' fields and orchards and killed their livestock. JA 649. In 1846, Wisconsin's territorial governor advocated removal as a solution to his State's "Indian problem." JA 668. (Three quarters of the 1837 Treaty area is in Wisconsin.) A Band expert observed that relations between Indians and settlers were "occasionally interrupted by violence." JA 1495. The Chippewa chiefs themselves conceded in 1851 that "some of our countrymen have had trouble with the whites." JA 227. There were ample reasons, that appeared reasonable in 1850, for President Taylor to revoke the Treaty privilege and to seek to remove the Indians from the territory. There has been no suggestion that *he* acted in bad faith.

But, more importantly, it is not for the courts to determine whether the President had good enough reason to terminate the privilege in February 1850. As the United States correctly observes, "He alone was vested with the discretion to determine whether the privilege should end." (U.S. Br. at 42.) In *Dalton v. Specter*, 511 U.S. 462, 476 (1994), this Court said: "How the President chooses to exercise the discretion Congress has granted him is not a matter for our review." The Bands contend that this holding does not apply, because of the government's obligation to act with good faith towards the Indians. But where the Treaty, agreed to by the Indians and approved by the Senate, committed that decision solely to the President without any standard, *Dalton's* reasoning applies fully. The Court cannot review the President's "good faith," i.e., the adequacy of his reasons, without violating the separation of powers.

C. The Revocation Order Was Never Withdrawn, Nor Could The Executive Branch Unilaterally Create A Special Privilege To Hunt, Fish and Gather After The Treaty Privilege Had Been Extinguished.

Respondents argue that the entire 1850 Order was abandoned by the federal government, and so was not effective to revoke the privilege under the 1837 Treaty. But there is no evidence that the President intended to or did suspend or rescind the provision of the Order revoking the Bands' privilege, nor could the President or others in the executive branch unilaterally resurrect the privilege after it had been terminated.

Respondents contend that the removal portion of the Order would have become effective only if the federal government had acted to enforce it. But unlike the removal portion of the Order, the provision revoking the hunting, fishing and gathering privilege did not require, or contemplate, any federal action to implement it. Rather, the Order provided that the "privileges granted temporarily to the Chippewa . . . of hunting, fishing and gathering . . . *are hereby revoked*." PA 565 (emphasis added). This provision was self-effectuating upon its issuance.

There is no evidence that the President, or even any lower federal official, purported to rescind the revocation of the privilege. Nor could the President have done so even if he wished. Once the privilege was extinguished, the President had no authority to create a binding privilege in favor of the Indians without the approval of Congress. Certainly the executive branch could choose to allow Indian hunting, fishing and gathering within federal territories, and even to provide the Indians supplies to assist them in such activities in federal territories or States. But the executive branch had no constitutional authority to unilaterally create a privilege of hunting,

fishing and gathering that would restrict the authority of a future State to regulate such activities.[7]

From the time the privilege was revoked in 1850, until 1945, the record is replete with statements by federal officials, including the President himself in 1938, that the Indians' right to hunt, fish and gather was terminated for one or more of the reasons asserted by the State here.[8] Over this time, Respondents cite only three contrary statements by federal officials. One is a somewhat oblique statement by the territorial governor in 1855. *See* JA 295-96. While one interpretation is that he thought the Indians' 1837 Treaty privilege continued to exist, there is no indication that he was aware of the events of five years earlier, nor is there confirmation of his views by other federal officials. The other two statements were those of a United States Attorney in 1897 and the Commissioner of Indian Affairs in 1928. JA 531-33, 545-46. It is apparent that neither was aware of the 1850 Order. After these statements, for a number of years the federal government frequently and uniformly took the position that the privilege under the 1837 Treaty was no longer effective. It was not until 1947, when the Indians sought additional compensation from the federal government, that the government adopted its current position that the privilege was not terminated. (U.S. Br. at 22.) This position, first adopted to avoid financial responsibility, deserves little weight.

The 1837 Treaty privilege was unquestionably revoked by the President's 1850 Order. That revocation was never rescinded, nor could it have been.

---

[7] The Bands incorrectly assert that the State has never denied that the President had the power to rescind the privilege revocation. The State made precisely this point in its Eighth Circuit Reply Brief at 14.

[8] *See, e.g.*, PA 575; JA 471-72, 547-48, 1789, 1792, 1794, 1796-98, 1799, 1801-02, 1803, 1804-05, 1806-07, 1808-10, 1823-30, 1832, 1835, 1874-76, 1892-99. Moreover, during this time, the State of Minnesota did enforce its game and fish laws against Indians hunting in the ceded territory, beginning at least by the late 1800s. PA 298-300.

D. The Revocation Provision Of The 1850 Order Was Severable.

Respondents argue that the removal portion of the 1850 Order was determined to be invalid, and the revocation portion was not severable. They assert that the usual presumption that separate provisions are severable should be reversed here, because doubts should be resolved in favor of the Indians. But this Court has never made such a holding in the context of severability, and it would fly in the face of the goal of the severability doctrine – to uphold the act of Congress (or, here, the President) insofar as possible. *See Alaska Airlines, Inc., v. Brock*, 480 U.S. 678, 684 (1987). And while the rights of Indians are important, upholding the normal range of state sovereignty is at least equally so.

Respondents contend that, to the extent the President issued the revocation portion of the Order to encourage removal, or to address Indian/settler conflicts, the revocation alone would not have achieved that purpose, because the Indians could have remained in the country and could have continued to hunt, fish and gather (since the federal government did not regulate such activities at that time). It is difficult to say what federal officials understood regarding those matters in 1850. But the Bands' own experts, the Bands in their brief to the circuit court, and the United States in its brief here, agree that the President issued the revocation Order to encourage removal. JA 675, 1026, 1100; Wisc. Bands 8th Cir. Br. at 17, 33-34; U.S. Br. at 26. Assuming that the President's goal when he issued the Order was to encourage the Indians to move, it is most likely that he would have issued the revocation portion separately, even if he could not have issued the removal portion. The Bands' expert agreed that this was true. JA 1100-01.

Since there was no reason to conclude here that President Taylor *would not have* issued the revocation portion of the Order separately (and indeed there was evidence to show that he would have), the lower court erred in not severing that provision and upholding the validity of the revocation.

III. THE 1855 TREATY EXTINGUISHED THE MILLE LACS BAND'S 1837 TREATY PRIVILEGE.

One of the Respondent Bands, the Mille Lacs Band, was party to an 1855 Treaty in which the Band "fully and entirely relinquish[ed] . . . any and all right, title, and interest, of whatsoever nature the same may be, which they may now have in, and to any other lands in the Territory of Minnesota or elsewhere." PA 503. The clear effect of this language is to extinguish any privilege the Band may have had to hunt, fish and gather in the 1837 Treaty area.

Respondents assert that the 1837 Treaty privilege is not a right, title or interest in land. But their right to use the natural resources on essentially their own terms derives from their "Indian title" to the land. Accordingly, when the bands, in the first sentence of Article 1 of the 1855 Treaty (not the provision at issue here), agreed to cede a specific tract of land to the federal government, they did so in the following language: "The . . . Indians hereby cede, sell, and convey to the United States all their *right, title, and interest in, and to, the* [described] *lands*." PA 502 (emphasis added). That treaty did not reserve any right or privilege to hunt and fish on the ceded land. All would agree that, by this language, the bands relinquished any special rights to hunt, fish and gather in the 1855 ceded territory. *See Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 766 (1985) (cession of all "right, title, and claim" to ceded area "unquestionably carried with it whatever special hunting and fishing rights the Indians had previously possessed" in the area). Prior to the cession of the lands, the Indians' rights regarding the lands were those of both an owner and a sovereign (subject, of course, to the overall sovereignty of the United States). *See Spalding v. Chandler*, 160 U.S. 394, 402-03 (1896). When the Indians sold the lands to the United States, any special Indian right to determine conditions of hunting, fishing and gathering, by them or anyone else, was extinguished. Both their

ownership and sovereignty over the land were terminated. No one would dispute this proposition.[9]

The Indians' pre-cession land interests are different from those of a private landowner. A private landowner's interest in his land generally includes the ability to determine access to the land, but not to determine conditions for hunting and fishing. That right belongs to the sovereign. The temporary interest retained by the Bands in the 1837 Treaty was a remnant of their Indian title over the land. The Mille Lacs Band relinquished this in the 1855 Treaty.

This Court's decision in *Klamath* strongly supports the State's position. Respondents correctly point out that *Klamath* recognizes that Indians may have special hunting and fishing rights, reserved by treaty, that are separate from the ownership of the land. *See* 473 U.S. at 765-66. There is no doubt that the Bands here ceded *ownership* of the land in 1837. But this does not mean that the temporary hunting, fishing and gathering privilege was not a *right and interest* in and to the land.

Respondents also note that the factual context in *Klamath* was not identical to that here – that the agreement there, where the Indians agreed to "cede, surrender, grant, and convey . . . all their claim, right, title and interest in and to" land, applied to a portion of the Indians' reservation that they were selling to the United States, and not to land that had been previously sold. Notwithstanding this difference, the importance of *Klamath* for this case is the Court's conclusion that "the normal construction of the words used in the 1901 Agreement unquestionably would encompass any special right to use the ceded lands for hunting and fishing." 473 U.S. at

---

[9] If Respondents' assertion that Indian hunting, fishing and gathering rights are not interests and claims in and to the land were correct, the provision of the 1837 Treaty temporarily reserving the privilege of hunting, fishing and gathering to the Indians would have been unnecessary. Their special right to hunt, fish and gather would have continued even without such a provision. But no one contends this is the law.

768. That conclusion applies equally here. In the 1855 Treaty, the Mille Lacs Band relinquished any remaining privilege.

CONCLUSION

The State requests the Court to reverse the lower court's decision.

October 1998

Respectfully submitted,

HUBERT H. HUMPHREY III
Attorney General
State of Minnesota

JOHN L. KIRWIN
Assistant Attorney General
Counsel of Record

PETER L. TESTER
MICHELLE E. BEEMAN
Assistant Attorneys General
445 Minnesota Street, Suite 900
St. Paul, Minnesota 55101-2127
(651) 296-3044

Counsel for Petitioners